IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

WP(C).No. 31974 of 2004(F)

PETITIONER:

KAMALA RAPHAEL, W/O.C.J.RAPHAEL
CHERIAPARAMBIL, AGED 55 , R/A. EARLS,
XIII/519A, CHUMKAM, FEROKE P.O. KOZHIKODE.

BY ADV. SRI.P.F.THOMAS (SR.)
SRI.SHIJU VARGHEESE
SRI.DILEEP VARGHESE
SMT.A.K.RANI

RESPONDENTS:

1. THE SECRETARY FAROKE GRAMA PANCHAYATH,
FAROKE, KOZHIKODE.

2. THE STATE OF KERALA, REP. BY THE
SECRETARY, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

ADDL. 3 T.C.MUHAMMED, S/O.IMBICHUTTIYAN, THODIYIL HOUSE,
FEROKE AMSOM, NELLOOR DESOM, KOZHIKODE.

" 4. FATHIMABI, W/O.MUHAMMED, DO. DO.

" 5. V.HAJIRA, W/O.ABDULLAKUTTY, VENGATTU MANZIL,
13/590, FEROKE AMSOM, NELLOOR DESOM, KOZHIKODE.

" 6. ABDUL RAZACK, S/O.MUHAMMED, POOVANKAVIL,
VELIPRAM AMSOM AND DESOM, KOZHIKODE.

ADDL. RESPONDENTS 3 TO 6 IMPLEADED AS PER ORDER DT. 7.3.2005 IN I.A.2476/05

R1 BY ADV. SRI.M.V.BOSE
R2 BY GOVERNMENT PLEADER SRI.K.J.MOHAMMED ANSAR.
ADDL.R3 TO R6 BY ADV.SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.31974/2004

APPENDIX

PETITIONER'S EXTS:

EXT.P1 – TRUE COPY OF NOTICE UNDER THE MUNICIPALITY ACT DT.11.2.03.

EXT.P2 – TRUE COPY OF REPLY NOTICE DT.17.2.03.

EXT.P3 – TRUE COPY OF FURTHER REPLY NOTICE DT.18.2.03.

EXT.P4 – TRUE COPY OF SHOW CAUSE NOTICE ISSUED BY R1 DT.6.2.04.

RESPONDENTS' EXTS:

EXT.R3(a) – TRUE PHOTO COPY OF COMPLAINT DT.1.8.03

EXT.R3(b) – TRUE PHOTO COPY OF JUDGMENT IN O.S.680/97 OF MUNSIFF'S COURT, KOZHIKODE-II DT.15.3.02.

EXT.R3(c) – TRUE PHOTO COPY OF JUDGMENT IN O.S.428/2000 OF DO. DT.27.2.03.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C) No.31974 OF 2004

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DATED THIS THE 12TH JANUARY, 2007

J U D G M E N T

The petitioner who is the owner of an item of immovable property situated in Sy.No.404/7 B2 of Feroke Village having an extent of 15.02 cents is aggrieved by Ext.P4 order of the 1st respondent-Feroke Grama Panchayat by which she is informed that the building which was constructed by her on the basis of the permit granted from the Panchayat is violative of the Kerala Municipality Building Rules, 1999 and hence the permit itself is liable to be cancelled. The 2nd respondent is the State and additional respondents 3 to 6 are the neighbours of the petitioners on whose complaint the Panchayat has issued Ext.P4. The petitioner submits that as owner of property having an extent of 15.02 cents, she proposes to construct a shop building so that the same can be let out and thereby the income for the subsistence of her family can be augmented. She submitted a plan before the 1st respondent and the plan was approved, and a building permit was issued vide No.BL.688/00-01. The period of the permit was for two years from the date of approval of the plan. Shop rooms were constructed completely according to the plan. But since those rooms were not numbered, they could not be let out to the

tenants. While so, there remained a small portion of land whereon the petitioner wanted to construct an additional room with staircase. She therefore submitted a revised plan on 5.2.2003. The revised plan was not approved. The petitioner was informed by the Panchayat office that the revised plan could not be traced out. On receiving that information, she submitted copy of the revised plan which was approved by the 1st respondent on 25.4.2003. The period of that permit was from 25.4.2003 till 25.4.2006. While submitting the revised plan, the petitioner excluded part of a well situated on her property since inclusion of the well was objected to by a neighbour on the ground that his family has also got the right of drawal of water from the well. It was after local inspection and after hearing objections of the neighbours that the revised plan was approved and permit was issued. But two of the neighbours who are residing away from the petitioner's property and beyond the boundary submitted a complaint to the Panchayat stating that the plan re-submitted did not provide for statutory setbacks on the four sides. Pursuant to that complaint, Ext.P1 notice was issued to the petitioner by the 1st respondent-Panchayat alleging that the constructions have been made deviating from the approved plan. To Ext.P1 the petitioner submitted

Ext.P2 reply dated 17.2.2003. On 18.2.2003 she submitted a further reply (Ext.P3) by way of clarification, producing documents to evidence that the objections raised were untenable and opposed to facts. Even after Ext.P3, the 1st respondent issued Ext.P4 on 6.2.2004 directing the petitioner to show cause as to why action should not be taken under Rule 16 of the Kerala Municipality Building Rules, 1999. The petitioner alleges that Ext.P4 was vague in all particulars and did not contain details of the violation and on account of such vagueness, the same is incapable of being complied with. She submits that she was directed to submit alterations in the revised plan excluding the well. Revised plan was submitted excluding the well over which claim was raised. When the petitioner collected materials for proceeding with the construction according to the revised plan, she received Ext.P4 informing her that the permit is liable to be revoked under Rule 16 of the Rules. According to the petitioner, she has not violated any rules and the construction was strictly in accordance with the building permit issued by the Panchayat. The complaint raised by neighbours is regarding the boundary between her property and the property of neighbours. There is no boundary dispute between the parties and the disputes raised are imaginary and legally and factually

unsustainable. It is alleged that the neighbours are bent upon preventing the petitioner from making any construction on her property. The proposed construction will not in any way affect the property of the neighbours or any of their rights. It is pointed out that the neighbours are owners of only small portions of properties. On these averments the petitioner prays that Ext.P4 be quashed and she be permitted to proceed with the construction without any hindrance till its completion as per Ext.P3.

2. A detailed counter affidavit has been filed by additional respondents 3 to 6. They have, along with the counter affidavit, produced Ext.R3(a) which is copy of the complaint submitted by them before the Minister for Local Self Government in respect of petitioner's constructions. They contend that there is a dispute between them and the petitioner in respect of a well as well as the property on the western side of the petitioner's property. The petitioner filed O.S.No.386 of 2003 before the Munsiff's Court, Kozhikode against the additional respondents and the same is pending. When the petitioner attempted to engulf the portion of the well used by additional respondents 3 and 4, they filed O.S.No.680 of 1997 before the Munsiff's Court, Kozhikode for a perpetual prohibitory injunction

against the petitioner. That suit was decreed. Ext.R3(b) is copy of the decree. Similarly, when the petitioner attempted to trespass into the property of additional 6th respondent, he filed O.S.No.428 of 2000. That suit was also decreed and Ext.R3(c) is copy of that decree. The additional respondents allege that if the petitioner carries out the construction, the same will be virtually by encroaching into the disputed property. The property of additional respondents 3 to 6 is situated on the immediate western side of the proposed commercial construction of the petitioner. Free passage of light and air to their houses will be obstructed. The additional respondents pray that this may not be permitted.

3. To the above counter affidavit the petitioner has filed a detailed reply affidavit reiterating the averments in the Writ Petition. It is submitted that the main contention of additional respondents 3 and 4 was that any construction of boundary will enclose the well behind the petitioner's property and situated on her property and that a portion of that well belongs to them. Additional respondents 3 and 4 are owners of a small portion of property having an extent of 2 ¼ cents. They filed a suit O.S.No.680 of 1997. Though that suit was decreed by the trial court, in appeal (A.S.No.33 of 2003) the decree

has been reversed. The appellate court by its judgment reversed the decree of the trial court and held that the well belongs to the petitioner and her husband. The appellate court also held that in the absence of a boundary wall, there was opportunity for the respondents to claim rights over the plaint schedule property. The appellate court has adversely commented on the attitude of additional respondents 3 and 4 (defendants in the suit) who are petitioners 1 and 2 in Ext.R3(a). So also the petitioner has filed another suit against them for recovery of trespassed property as O.S.No.428 of 2003. It was decided against the petitioner. The appeal filed by the petitioner against that decree is pending before the Sub Court. Now that A.S.No.33 of 2003 has been allowed, there is every likelihood that this appeal will also be allowed. The suits at any rate have nothing to do with construction of the shop rooms which are already partly constructed. O.S.No.386 of 2003 related to the boundary on the rear side, filed by another complainant. There is no obstruction of free passage of light and air due to the constructions to the respondents whose buildings are not residential buildings. Additional 6th respondent's building is a two storied commercial building and the two storeys are let out to tenants. The petitioner concludes the reply affidavit by highlighting that she has

already expended huge amounts for the construction and that unless she is permitted to continue with the construction she will be put to more hardship.

4. Heard the submissions of Mr.P.F.Thomas, Senior Advocate on behalf of the petitioner and Mr.T.Sethumadhavan, Advocate on behalf of the additional respondents. The submissions of the learned counsel were mainly on the basis of the affidavits of the parties and the documents placed on record by them.

5. Mr.P.F.Thomas would place before me copy of the judgment in A.S.No.33 of 2003 on the files of the Sub Court, Kozhikode arising from the judgment and decree in O.S.No.680 of 1997 of the Munsiff's Court, Kozhikode. The judgment shows that the claim of the petitioner that the said appeal has been allowed in her favour is correct.

6. Having considered the rival submissions and having gone through the affidavits and the various documents placed on record, I am of the view that the issue covered by Ext.P4 is liable to be reconsidered by the Panchayat. Accordingly the Writ Petition will stand allowed, Ext.P4 is quashed and the Panchayat is directed to take a fresh decision after hearing the petitioner. The petitioner will produce all materials including the appellate judgment before the Panchayat.

Fresh decision as directed above will be taken by the Panchayat at their earliest and at any rate within two months of receiving copy of this judgment. Pending final decision as directed above, the petitioner is permitted to install rolling shutters for the constructions already made so that trespassers will not enter and the constructions will be secure. The parties will bear their costs.

(PIUS C. KURIAKOSE, JUDGE)

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